# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN DAVID DANIEL,

Defendant-Appellant.

UNPUBLISHED
December 28, 2006

No. 263622
Wayne Circuit Court
LC No. 04-007698-01

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 17 to 35 years' imprisonment for the assault conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

## I. Underlying Facts

Defendant was convicted of shooting his former girlfriend, Sheba Lazarus, in the face. According to Lazarus's testimony, she ended her relationship with defendant in early 2004, but defendant was unwilling to accept their breakup. He would call her, come to her home, and follow her to work. In May 2004, while making an unsuccessful attempt to obtain a personal protection order (PPO) against defendant, Lazarus became aware that defendant had obtained a PPO against her. She was formally served with defendant's PPO on May 27, 2004. A few weeks later, on June 18, 2004, Lazarus worked the morning shift at Hutzel Hospital. At about 3:00 p.m., after the shift ended, defendant attacked Lazarus at her car in a parking structure. Defendant pushed her onto a seat in the car and shot her in the face. Lazarus then struggled with defendant for the gun. Defendant fled on foot after Lazarus screamed and sounded the car horn. Lazarus was taken to a hospital emergency room by some of her coworkers.

According to defendant's testimony, Lazarus made a false police report against him and started becoming violent in May 2004. He moved out of Lazarus's home. On May 6, 2004, he applied for a PPO against Lazarus. On June 18, 2004, he and Lazarus had a prearranged meeting at a parking structure so that Lazarus could return some of his property and reimburse him for money she took by writing fraudulent checks against his bank accounts. When he met Lazarus at her car, she pointed a gun at him. The gun discharged while he struggled with Lazarus to keep

her from shooting him. Defendant yelled, "Someone call 911. She is trying to shoot me, she is trying to kill me," before he fled. He recalled seeing the gun fall under a seat in the car before he fled. After traveling to Las Vegas, defendant took steps to turn himself in to the police.

Several witnesses were in the parking structure at the time of the incident. One of Lazarus's coworkers, Lynn Laity, testified that she approached the car after hearing Lazarus scream. Lazarus was wandering in a daze. She screamed, "Allen shot me, Lynn, he shot me, he tried to kill me, I don't know what I'm going to do." Another witness, Antoinette Sykes, testified that she heard Lazarus scream, "I've been shot; he's trying to kill me," while a third witness, Terry Gardner, testified that she overheard defendant yell, "She's trying to kill me," as he fled from Lazarus's car. The Detroit Police did not recover any gun at the scene during its investigation.

## II. Jury Array

On appeal, defendant argues that he was denied his Sixth Amendment right to have a jury drawn from a fair cross-section of the community. In general, our review of this constitutional issue is de novo. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003), lv den 469 Mich 987 (2003). "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Here, during jury selection, defense counsel objected to the jury pool on the ground that it did not contain a representative number of African-Americans from the community. After the jury was empanelled and sworn, defense counsel renewed the matter, stating that he did think that the panel was fair. While the importance of protecting a defendant's jury trial rights cannot be overstated, there are boundaries for proving violations of those rights, and the assertions made here were simply inadequate to establish a prima facie case. See *People v Williams*, 241 Mich App 519, 527; 616 NW2d 710 (2000), lv den 463 Mich 921 (2000). Therefore, the trial court properly rejected defense counsel's request for a new jury pool on this ground.

On appeal, defendant for the first time raises the claim that Wayne County has an apparent, persistent problem in the manner in which jurors are drawn. Such an allegation challenges the very foundation of our fair trial guarantee; however defendant has failed to provide any evidence, and the record likewise yields none, to support this claim. This Court recently addressed a similar unsupported claim, in an unpublished opinion which, while not binding, we find sufficiently parallel to merit citation here:

> Defendant has altered his position on appeal and now argues that Wayne County's jury selection system "siphons-off" residents living in Detroit to sit on juries in the 36th District Court. Defendant did not advance this theory below and did not provide, in the trial court or on appeal, any factual support that supports his theory. Although we agree with defendant's recitation of the harms inherent in systematic exclusion, a defendant must do more than merely assert allegations of exclusion. *People v Williams*, 241 Mich. App. 519, 526-527; 616 N.W.2d 710 (2000). "Defendant has the burden of demonstrating a problem inherent within the

> selection process that results in systematic exclusion." *Id*. at 527. Here, defendant failed to meet his burden in this case, because he only asserts that his underrepresented venire "apparently result[ed]" from improper "siphoning." Defendant does not elaborate on or provide factual support for his theory, and ultimately relies only on his speculative allegations. Therefore, we reject defendant's argument. See *id*. [People v French, 2006 Mich App LEXIS 3210, at 5 (Docket No. 260543) (2006)]

Because there is no record evidence to support defendant's allegations, we have no means of conducting a meaningful review of this claim. *McKinney, supra* at 162.

Defendant's claim that his Fourteenth Amendment rights were violated by the alleged inadequate representation of minority venire members also lacks record support. In the context of an equal protection challenge to a state grand jury, a defendant claiming systematic discrimination must:

> (1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral. [*Williams, supra* at 527-528, citing *Castaneda v Partida*, 430 US 482, 494; 97 S Ct 1272; 51 L Ed 2d 498 (1977).]

Assuming that this test would also apply to a petit jury, as was done in *Williams, supra* at 527 n 5, defendant has failed to make out a prima facie case of systematic discrimination under the Fourteenth Amendment. Defendant's reliance on *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), in support of his claim of systematic discrimination is misplaced. Although the goal of *Batson* and its progeny is "to promote racial neutrality in the selection of a jury and to avoid the systematic and intentional exclusion of any racial group," *People v Knight*, 473 Mich 324, 349; 701 NW2d 715 (2005), cert den 126 S Ct 759; 163 L Ed 2d 590 (2005), the *Batson* test was developed to evaluate peremptory challenges to prospective jurors. *Id.* at 335-336. "Under the Equal Protection Clause of the Fourteenth Amendment, a party may not exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race." *Id.* at 335.

The first step of the *Batson* test requires the opponent of the peremptory challenge to make out a prima facie showing of discrimination. *Id.* at 336, 342. The opponent must show that: "(1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race." *Id.* at 336. A *Batson* challenge is timely if it is made before the jury is sworn. *Id.* at 348.

Here, defense counsel informed the trial court, before the exercise of peremptory challenges, that he suspected that the prosecutor would use peremptory challenges to remove African-American jurors. After the jury was selected, defense counsel informed the trial court that the "defense is satisfied." The trial court had the jury sworn, dismissed the jury, and then

sua sponte made a record of the race of prospective jurors who were dismissed by the prosecutor and defense counsel. After the trial court completed its record, defense counsel attempted to make a *Batson* challenge with respect to two jurors who were peremptorily excused by the prosecutor, but the trial court declined to consider his challenge because it was untimely. The trial court also expressed that there was no basis for a *Batson* challenge and denied a defense motion for a mistrial.[1]

Because defendant does not address any specific *Batson* challenge raised at trial, or the trial court's finding that the *Batson* challenges were untimely, we deem this issue abandoned and decline to address it. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly,* 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

## III. Other Acts Evidence

Next, defendant argues that the trial court abused its discretion by allowing the prosecutor to introduce other acts evidence, contrary to MRE 404(b), and related hearsay utterances. We note first that defendant did not properly brief this claim,[2] nor identify any specific evidence that he claims is inadmissible, with specific references to the record.[3]

Although defendant does not make specific reference to the trial transcript in support of this claim, it seems evident that the testimony he objects to is the testimony of Officer Oakie of

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[1] Upon review of the transcript of jury selection and the transcript of the judge's record of all the potential jurors considered and dismissed, we agree that there was no basis for a *Batson* challenge.

The final makeup of the jury (12 seats + 2 alternates) was eight Caucasian, one Arab/Caucasian, and five African American members.

The defense attorney peremptorily challenged nine Caucasian potential jurors and one African American potential juror.

The prosecutor peremptorily challenged two Caucasian potential jurors and four African American potential jurors.

The court, with agreement by both parties, excused for cause five Caucasian potential jurors and five African American potential jurors.

[2] "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald,* 237 Mich App 186, 197; 602 NW2d 834 (1999), lv den 461 Mich 996 (2000).

[3] Facts stated in support of an appellant's argument "must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." MCR 7.212(C)(7). We will not search the record to find factual support for a defendant's claim. *Derderian v Genesys Health Care Systems,* 263 Mich App 364, 388; 689 NW2d 145 (2004), lv den 474 Mich ___ (2005); *People v Norman,* 184 Mich App 255, 260; 457 NW2d 136 (1990), lv den 437 Mich 975 (1991).

the Roseville Police Department. Oakie testified that she had listened in on a phone call during which defendant told Ms. Lazarus that "he was going to, pardon the words, beat her fucking ass and he was going to give her a reason for having called the police on him."

In addition, it appears defendant objects to the testimony of Ms. Lazarus as to the events of the month preceding the shooting. The transcript of Ms. Lazarus' direct testimony, to which defense counsel objected at trial, is as follows:

> PROSECUTOR: Describe just briefly what occurred during the contact you had with Mr. Daniel during the month of May of '04?
>
> MS. LAZARUS: Well, there were several times he came to my house and wanted to talk to me and I disagree to let him in the house. I was at work one time and he went over to my house –
>
> DEFENSE COUNSEL: Objection to the hearsay, your Honor, as to what - -
>
> MS. LAZARUS: - - and harassed my children.
>
> THE COURT: Hold on. Hold on. This visit to the house when she wasn't home may entail hearsay. It may not, but even if it doesn't, there needs to be a fuller record made.
>
> PROSECUTOR: Okay. I can do that.
>
> THE COURT: Foundation. Okay.
>
> PROSECUTOR: In fact, we'll stop right there.

The trial court's decision to admit other acts evidence is reviewed for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). To be admissible under MRE 404(b), (1) the evidence must be offered for a purpose other than a character or propensity theory, (2) the evidence must be relevant under MRE 402, as enforced through MRE 104(b), (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice pursuant to MRE 403, and (4) the trial court, upon request, must give a limiting instruction under MRE 105. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *Sabin*, *supra* at 55-56.

We find that the trial court did not err in admitting this evidence under MRE 404(b). MRE 404(b) specifically recognizes motive and intent as proper purposes of other acts evidence. *Sabin*, *supra* at 56. Evidence of discord, or the lack thereof, in a domestic relationship has long

been regarded as relevant evidence of motive in a case involving assaultive conduct. See *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995), reh den 450 Mich 1208 (1995). Evidence of prior assaults or threats in a domestic relationship are clearly relevant to motive and intent where, as here, the crime charged is one of violence between partners in a domestic relationship.

Here, defendant was charged with assault with intent to commit murder, which required proof of an assault, with an actual intent to kill that, if successful, would constitute murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), lv den 474 Mich 989 (2005); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). "An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). The jury was also permitted to consider a lesser charge of assault with intent to do great bodily harm, and was given specific instructions on defendant's defense that the gun discharged accidentally.

The trial court found that the other acts evidence showed a pattern of threats and violent actions against property that were relevant to motive and intent. The court also noted that the evidence might be relevant to show absence of accident or mistake, should defendant pursue the defense that the gun discharged accidentally. The court also concluded that in these circumstances, the probative value of the evidence was not outweighed by its prejudicial impact. Finally, the trial court gave a proper cautionary instruction to the jury advising that it was to consider whether the evidence of defendant's other acts "tends to show that the Defendant had a reason to commit the crime or the Defendant specifically meant to murder or seriously injure Sheba Lazarus or that the Defendant acted purposely, that is not by accident or mistake" and "must not consider this evidence for any other purpose. . . ."

We agree, and we find that the evidence challenged by defendant here was properly admitted to establish defendant's intent to injure Lazarus or place her in fear of an immediate battery, and to show that his actions were not the result of an accident, mistake, or self-defense.

Defendant also notes in his brief, without elaboration, that "any property damage that may have been caused by Mr. Daniel at the house in Macomb County in May, 2004" is irrelevant to the crime charged here. Assuming that this claim relates to Lazarus' testimony about an incident on May 14, 2004, when she found her home vandalized, defendant has not established any basis for reversal. Lazarus conceded that she did not see defendant vandalize her home. Regardless of whether Lazarus's testimony supported an inference that defendant actually committed the vandalism, we are satisfied that defendant was not prejudiced by Lazarus's testimony. Any error was harmless because it is not more probable than not that the jury would have resolved the credibility contest between defendant and Lazarus differently had it not heard that Lazarus's home was vandalized. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

## IV. Judicial Misconduct

Finally, defendant argues that the trial court pierced the veil of impartiality, denying him a fair trial. We review unpreserved due process challenges to a trial court's conduct under the plain error doctrine in *Carines, supra.* See *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006). A preserved due process challenge to the trial court's conduct is reviewed de novo

as a question of law. *In re Hocking*, 451 Mich 1, 5 n 8; 546 NW2d 234 (1996). Where a trial court denies a motion for mistrial, we review its decision for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995), lv den 453 Mich 919 (1996).

In general, we apply the following analysis to determine if a trial court's comments or conduct deprived a defendant of a fair trial:

> Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." [*Conley*, *supra* at 307-308 (citations omitted).]

We find that defendant has not established that any of the trial court's challenged comments or conduct pierced the veil of impartiality.

First, defendant claims that the trial court pierced the veil of judicial impartiality during defense counsel's cross-examination of the evidence technician. We disagree. Defense counsel asked the witness whether she had been instructed to look for a gun in the car. The prosecutor objected on the ground that defense counsel had mischaracterized an earlier question. Still in the presence of the jury, this exchange followed:

> THE COURT: "Mr. Paige, is this really a point worth even pursuing?
>
> DEFENSE COUNSEL: Yeah, because I'm going to argue to the Jury that the gun was still in the car.
>
> THE COURT: Oh, really?
>
> DEFENSE COUNSEL: Yes, it is.
>
> THE COURT: You're going to argue the gun was in the car?
>
> DEFENSE COUNSEL: Yes, or somewhere around the car.
>
> THE COURT: Based on what?

Defense counsel then asked for a mistrial.

The mere inquiry about counsel's planned course is not itself out of bounds, as a trial court has a duty to limit evidence and arguments to relevant and material matters. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). A trial court should, however, to the extent practical, make its rulings outside the presence of the jury. MRE 103(c). But a ruling such as this, even in front of the jury, does not of itself demonstrate partiality of bias: "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996) (citing *Liteky v United States*, 510 US 540; 114 S Ct 1147, 1155 (1994)).

Next, defendant challenges the trial court's remarks during Lazarus's testimony. We find that these remarks were not of a nature that would unduly influence the jury against defendant. Defense counsel accused Lazarus of lying, and the prosecutor objected. The court stated that it "is highly inflammatory and unnecessary for you to accuse her of lying," and asked defense counsel to refrain from accusing the witness of lying. Defense counsel objected and asked for a mistrial on that basis. The court responded: "Move on. Don't argue with me and don't argue with my rulings."

The more appropriate course for the trial court would have been to admonish counsel, if admonishment were needed, out of the presence or at least the hearing of the jury. However, in this Court we have only the cold record to rely on, which is simply no substitute for the live version. Relying on the cold record, we note that two pages after this exchange between the court and defense counsel, the witness, Ms. Lazarus, stated in response to a question, "Can I ask you again, please, not to shout at me?" This provides some context, albeit imperfect, for the general tone of the trial at that point. Examined in context, it appears that the trial court was attempting to limit argumentative questions during defense counsel's cross-examination. Pursuant to MRE 611(a), the trial court was permitted to exercise reasonable control to protect witnesses from harassment.

Defendant challenges several other remarks made by the trial court, and again we find the remarks, in context, fail to demonstrate the partiality required. One remark related to the relevancy of defense counsel's cross-examination of Lazarus about cell phone records, in response to the prosecutor's objection, and the other remark related to defense counsel's cross-examination of Lazarus about the content of a PPO exhibit shortly after it admitted the exhibit for a limited purpose.

Examining the record as a whole, *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995), lv den 453 Mich 977 (1996), we are satisfied that the trial court's remarks were not of such a nature as to unduly influence the jury and thereby deprive defendant of a fair and impartial trial. *Conley*, *supra* at 308. We can presume, based on the record, that the jury followed the trial court's cautionary instructions: "when I make a comment or give an instruction [sic] I'm not trying to influence your vote or express a personal opinion" and "[i]f you believe that I have an opinion about how you should decide the case, then pay no attention to that

opinion. You are the only judges of the facts and you should decide this case from the evidence" See *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005), lv den 476 Mich 863 (2006) (jurors are presumed to follow their instructions). Reversal is not warranted.

Affirmed.

/s/ Stephen L. Borrello
/s/ Janet T. Neff
/s/ Jessica R. Cooper